IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL SUITS No 4 of 1975

For Approval and Signature:

Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

UNION OF INDIA

Versus

OWNERS AND PARTIES INTERESTED IN MOTOR VESSEL

Appearance

MR AKSHAY H MEHTA Sr. Standing Counel for plaintiffs

MR MD PANDYA for defendant nos.1 & 4

NOTICE SERVED for defendant no.2.

CORAM : MR.JUSTICE K.M.MEHTA

Date of Order: 09/08/2000

C.A.V. JUDGMENT

1. Union of India and the Food Corporation of India respectively are as plaintiffs nos. 1 and 2. On or about July 14, 1973 the Union of India, the first plaintiff herein, entered into a chartered party contract

with Lief Hoeght and Co., Oslo, Norway- defendant no.1 who are the owners of the vessel Hoegh Orchid (with the first defendant herein) for the safe transport, carriage and discharge of the bulk consignment of diammonium phosphate weighing about 12500 metric tons. The Food Corporation of India, as agents of the Union of India in Department of Agriculture were indicated in the respective bills of lading as consignee of the said consignment. Messrs Transamonia Export Corporation of New York and Messrs Continental Ore Corporation of New York who are second and third defendants herein were the suppliers of the said materials.

2. The second consignment of the said material weighing about 2540.143 metric tons was loaded on the said vessel at the port Tafi La. It is claimed by the plaintiffs that the first defendants in token of having received on board of the said vessel, clean, sound cargo, issued through the master of the said vessel and/or their agents for the master, two bills of lading Bill of Lading No. T/I-1 dt. September 2, 1973 and Bill of lading no. 1 dated Tafi La September 6, 1973 respectively. It is also claimed by the plaintiffs that the loading of operations at port Tampa Florida and TAfi La were surveyed by national Cargo Bureau Inc. and New Oreleans La which had issued certificates of loading dated September 2, 1973 and September 6, 1973 respectively. The plaintiffs also claimed that Messrs Amerispect Corporation of New York Cargo Surveyors, Weighers, Samplers, and Inspectors had held the inspection at the time of loading on the said vessel with regard to the quantity and quality of the said consignment and a survey of inspection dated September 10, 1973 was issued by them in that behalf. It is also claimed by the plaintiffs that the first defendants through the master of the said vessel issued two statements of facts specifying day-to-day intake of the said cargo at the respective ports of loading on September 3, 1973 and September 6, 1973. According to the plaintiffs, the defendants were bound to supply, carry and deliver the full and complete quantity of 12731.331 metric tons at the port of Bhavnagar which was a port of discharge. The said vessel reached the port of Bhavnagar, according to the plaintiff, on October 20, 1973 and commenced discharging cargo on October 22, 1973 and completed the full discharge on November 22, 1973. The plaintiffs averred said say that against the Manifest quantity of 12731.331 metric tons the plaintiffs have received 12525.555.55 metric tons and therefore there was a clear short delivery of 205.775.500 metric tons and the plaintiffs are therefore entitled to recover Rs. 2,03,317.33 as

damages for non-delivery and/or for conversion and/or for negligence by the aforesaid defendants who were bound under the contracts to supply, carry and deliver the agreed quantity of the bulk consignment. The plaintiffs had originally preferred a claim of Rs. 218610.12 by the letter of December 27, 1973 addressed to the 4th defendant, which claim was revised and amended by the letter of July 29, 1974 wherein 4th defendants were called upon to pay a sum of Rs. 3,01,555.00. The plaintiffs therefore prayed for a judgment and decree against the said defendants of the said vessel Hoegh Orchid, her tackle apparel and furniture for the sum of Rs. 2,03,317.33 together with interim interest and also for judgement and order if necessary for the appraisement and the sale of the said vessel and payment out of the proceeds of sale to the plaintiffs of the amount decreed together with interest and costs.

3. After the summons was served to the defendant nos. 1 and 4, had taken notice of motion by Civil Application No. 4 of 1976 in present Civil Suit on 8th January, 1976. In the said notice of motion it was stated that by the chartered party dtd. 14th July, 1973 being Exh."B" to the plaint entered into between Lief Hoegh & Co. A/S, Parkveien 55, Oslo 1, Norway the 1st defendants as owners of the vessel M.V.. Hoegh Orchid and the 1st plaintiffs as the Charterers, it was inter alia agreed that any dispute arising under the Charter Party to be referred to arbitration in London. The Clause 17 of the said charter party provides for the same and reads as under :

> "Any dispute arising under this charter shall be settled in accordance with the provisions of the Arbitration Act 1950 in London, each party appointing an Arbitrator, and the two Arbitrators in the event of disagreement appointing an Umpire whose decision shall be final and binding upon both parties hereto. The Arbitrator shall be commercial men."

4. It was stated that alleged claim of the plaintiffs is disputed by the 1st defendants and there is a dispute by and between the parties to the said charter party regarding the plaintiffs' alleged claim. It was further stated that the said dispute arising out of the plaintiffs' claim in the present suit is covered by and within the scope and ambit of the said arbitration clause 17 in the said Charter party dtd. 14th July, 1975. It was stated that as Indian and Norway are both signatories to the Convention under the Foreign Awards (Recognition

and Enforcement) Act, 1961 the Courts of such contracting States are bound to recognize an agreement in writing made between the parties viz. the 1st plaintiffs and the 1st defendants under which they have undertaken to submit all disputes arising under the said agreement to a specific arbitral tribunal. It was stated that the tribunal agreed upon by the parties viz. London also belongs to a convention country and plaintiffs are bound by the said arbitration clause 17 in the said Chartered Party and there is a statutory obligation upon the plaintiffs to refer the said dispute to arbitration in London as provided therein. Therefore, the present suit is not maintainable in the eye of law and that suit should be stayed in view of Section 3 of the Foreign Awards (Recognition and Enforcement) Amendment Act, 1973.

5. Objection about the said application was also taken by the plaintiff by filing an affidavit of Mr. J.N.Antao, Assistant Director (Food) and District Manager, Food Corporation of India on or about 24th March, 1976. The arbitral clause in the chartered party contract provided for a reference of dispute to arbitration in a foreign country is not binding upon the Union of India. In any case this Court should refuse to exercise its discretion having regard to the nature of the claim as well of the defence and the overall balance of convenience which inter alia included the convenience of the witnesses who are of within the jurisdiction of this court and the entire evidence of loss is in the records and proceedings at the port of Bhavanagar and also having regard to the fact of acute hardship of foreign exchange which would not in all probability be granted for carrying the witnesses from India to London.

6. Notice of motion was taken out by defendant was heard by this Court (Coram : B.K.Mehta,J) and this Court by its order dtd. 4th May, 1982 being considering the facts and evidence on record and position of law pleased to hold as under :

> "For the reasons which will be pronounced hereafter I am of the opinion that defendants nos.1 and 4 are entitled to the stay of the suit as prayed for by them in the present notice of motion taken out by them. I accordingly make the notice of motion absolute in terms of prayer clause (a) of the summons. Application is accordingly dispose of with costs."

7. At the time of hearing of the suit Mr. M.D.Pandya learned advocate appearing on behalf of

defendant nos. 1 and 4 and has stated that the defendants had already taknen out notice of motion. The contention raised in the notice of motion may be treated as part of final arguments in this suit and, therefore, I have realied upon the said contention raised by the defenant nos. 1 and 4. Shri Akshay Mehta learned advocate for the plaintiff has also stated that the plaintiffs have not proudced any further material and whatever contention raised by Union of India in the plaint may be taken as final arguments in this suit also. The suit is to be heard finaly. In view of the consent of the parties I have heard the matter for final disposal.

8. At the time of hearing of the suit, on behalf of plaintiffs Shri Akashay Mehta, Sr. Standing Counsel for Union of India stated that the agreement is inoperative or incapable of being performed since it affects the sovereignty of the Union Government and therefore the Court is bound to refuse to exercise the jurisdiction in favour of the defendants. In any case, he urged that this Court can refuse to exercise the discretion if the Court is satisfied on just and reasonable ground or from the point of view of balance of convenience that this is preeminently a case where the suit should not be stayed. In support of his later contention the learned counsel for the Union of India pointed out that the plaintiffs have claimed a decree against the suppliers also, namely, the second and third defendants and it is nobody's case that there was an agreement to refer the dispute between the plaintiffs and the said defendants to arbitration. The exercise of discretion by the Court to say the suit as prayed for by the first and fourth defendants would inevitably result into the dispute in the suit being tried before two forums, on before this Court and another before the domestic tribunal of arbitrators appointed by the plaintiffs on the one hand and the first and fourth defendants on the other. The learned counsel for the Union of India also pointed out that the entire evidence oral as well as documentary in support of their claim in the suit is within the jurisdiction of this Court and it would cause a great inconvenience to the plaintiffs to carry the same to a foreign country where the arbitration proceedings are to be held and particularly when the foreign exchange position is not too happy to permit such a course to be approved of.

9. At the time of hearing of this suit the learned counsel for the 1st and 4th defendants urged that ordinarily a party which as entered into a contract containing an arbitral clause as its integral part should

not be assisted by the Court when it seeks to rescind from it and particularly having regard to the mandatory provisions contained in Section 3 of the Foreign Awards Act the Court is bound to make an order staying the proceedings unless it is satisfied that the agreement is null and void, inoperative or incapable of being performed or in fact there is no dispute between the parties with regard to the matter agreed to be referred. In other words, the submission of the learned counsel for the 1st and 4th defendants was that the Court has no discretion to refuse to stay the suit or proceedings where the conditions prescribed in Section 3 of the Foreign Awards Act are satisfied unless the case falls within the excepted 3 or 4 categories specified therein. It was emphasized by the learned counsel for the said defendants that this legislative mandate is unequivocal pursuant to the amendment made in Foreign Awards (Recognition and Enforcement) Act, 1961 by the Amendment Act of 1973 in the light of the decision of the Supreme Court in M/s. V/O. Tractorexport, Moscow Vs. M/s. Tarapore and Co. Madras and another, AIR 1971 Supreme Court 1.

10. This matter arises out of section 3 of the Foreign Awards (Recognition and Enforcement) Act, 1961 (hereinafter referred to as "the Foreign Awards ACt"). Section 3 of the Act reads as under : (As amended by Act 47 of 1973 with effect from 26.1.19734)

"Sec.3 Notwithstanding anything contained in the Arbitration Act, 1940 or in the Code of Civil Procedure, 1908, if any party to an agreement to which Art.II of the Convention set fourth in the Schedule applies, or any person claiming through or under him commences any legal proceedings in any Court against any other party to the arbitration agreement or any person claiming through or under him in respect of any matter agreed to be referred to arbitration in such agrement, any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other step in the proceedings, apply to the Court to stay the proceedings and the Court, unless satisfied that the agreement is null and void, inoperative or incapable of being performed or that there is not, in fact, any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings."

11. The Hon'ble Supreme Court concerned with interpretation of Section 3 of Foreign Awards Act. At this stage, it is required to be noted that language of section 34 of the Arbitration Act, 1940, conferred discretion on the trial court to stay or not to stay suit proceedings, but the language of section 3 of the Foreign Awards Act is mandatory as held by the Supreme Court in the case of Renusagar Power Co. Ltd. Vs. General Electric Company, reported in AIR 1985 SC 1156. Before the Hon'ble Supreme Court one question which was raised are as under :

"Whether under Sec. 3 of the Foreign Awards (Recognition and Enforcement) Act, 1961, having regard to its scope, a suit in the nature of a petition under Section 33 of the Arbitration Act, 1940 could be stayed? If, so whether the 1st respondent have made out a case for staying the Appellants' suit no. 832 of 1982 ?"

After examining the facts of the case and also Hon'ble Supreme Court in para-51 observed as under :

Para : 51

In the first place the section opens with a non obstante clause giving overriding effect to the provision contained therein and making it prevail over anything to the contrary contained in the Arbitration Act, 1940 or the Code of Civil Procedure, 1908. Secondly, unlike S.34 of the Arbitration Act which confers a discretion upon the Court, the section uses the mandatory expression "shall" and makes it obligatory upon the Court to pass the order staying the legal proceedings commenced by a party to the agreement if the conditions specified therein are fulfilled. The conditions required to be fulfilled for invoking Sec. 3 are :

(i) There must be an agreement to which Article II of the Convention set forth in the Schedule applies, (It is not disputed that this is so in the instant case);

(ii) a party to that agreement must commence legal proceedings against another party thereto. (It is again not disputed that

Rensuagar and G.E.C. are the two parties to the arbitration agreement and that Rensusagar has commenced legal proceedings against G.E.C. by filing Suit No. 832 of 1982);

(iii) the legal proceedings must be "in respect of any matter agreed to be referred to arbitration' in such agreement. (The question whether this condition is fulfilled here needs to be decided) ;

(iv) the application for stay must made before filing the written statement or taking any other step in the legal proceedings. (Admittedly this condition is Fulfilled) ;

(v) the Court has to be satisfied that the agreement is valid, operative and capable of being performed; this relates to the satisfaction about the 'existence and validly' of the arbitration agreement. (In the instant case these questions do not arise.);

(vi) the Court has to be satisfied that there are disputes between the parties with regrd to the matters agreed to be referred; this relates to effect (scope) of the arbitration agreement touching the issue of arbitrality of the claims, (It will have to be dealt with while considering the satisfaction of condition (iii) above).

12. Even this Court (Coram : M.S.Shah,J) in the matter of Societe Commercial De Coreals and Financiers S.A. Vs. State Trading Corporation of India & Anr reported in 1998(1) GLR p. 744 after relying upon the judgment of the Supreme Court held in para 9 page 749 as under :

Para : 9 (page 747)

In view of the above, it must be held that defendant no.2 was a party claiming through or under defdndant no.1 in respect of the subject-matter of the suit and also in respect of the subject-matter of the dispute in question

which is sought to be refrred to arbitration and, therefore, defendant no.2 was also entitled to apply to the Court to stay the suit proceedings. The second ground which appealed to the trial Court must also, therefore, fail.

13. In my view Section 3 of the Foreign Awards Act as amended entitled to a party to legal proceedings commenced by a party to agreement to which New York convention applied or in person claiming through or under him in any Court against other party to the agreement, or any person claiming under or through him, to apply to the Court to stay proceedings and Court is bound to stay the proceedings unless the case falls within excepted categories specified in Section 3. In view of the judgement of Hon'ble Supreme Court in the case of Rebysagar (Supra) and the judgment of our High Court in the case of Societe Commercial De Coreals and Financiers S.A. (Supra), the provisions of section are mandatory and it is not disputed. These two parties to the arbitration agreement and plaintiff has commenced legal proceedings against the defendant nos. 1 and 4 by filing present suit. The proceedings are also in respect of matter agreed to be referred to arbitration as per clause set out earlier. The application for stay has been filed by the defendant nos.1 and 4 before taking other steps in the legal proceedings. In the present case I am satisfied that the agreement is valid, operative and capable of being performed and it is mentioned that there are dispute between the parties with regard to matters agreed be referred. In this case, defendant nos 1 and 4 had already taken out notice of motion and this Court (Coram : B.K.Mehta, J) had already decided the matter by his judgement dated 4.6.1982 for which I have made reference earlier. After passing of the said order there are no changes in the circumstances. For the reasons stated by this Court (Coram : B.K.Mehta,J) and for the reasons which I have stated earlier and in view of the judgment of the Hon'ble Supreme Court and judgement of our High Court, defendant nos. 1 and 4 are entitled to stay of the suit as prayed for by them. I accordingly stay the suit and direct the parties for entering into an international commercial arbitration in accordance with law as per the clause 17 of the Charter party which I have quoted earlier.

14. It may also be noted that Mr. M.D.Pandya, learned advocate for the original respondent has pointed out that during pendency of this suit, the provisions of Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the New Act") have come into force with

effect from January 25, 1996. Section 85 of the New Act provides for repeal of the Arbitration Act, 1940 and the Foreign Awards Act except in respect of arbitral proceedings which had already commenced. He submitted that in the instant case, the arbitral proceedings had not commenced on the date of commencement of the New Act only suit is pending as an original proceedings and in the said suit the plaintiff has prayed only for judgment and decree against defendant nos.1 and 4 and the said vessel Hoegh Orchid her tackle apparel and furniture for the sum of Rs. 2,03,317.33 and also if necessary an order for the appraisement and sale of the said vessel, her tackle apparel and furniture and payment out of the proceeds of sale to the plaintiff of the amount decree. It was submitted that since issue is not concluded and on very first day defendant has filed application for staying of the suit under Section 3 of the Act, the provisions of New Act will apply.

15. The Learned counsel for the defendants no.1 and 4 has also submitted that in view of Sec. 85 of the Arbitration and Conciliation Act, 1996, the provisions of the Old Act will not apply which provides repeal and saving. he has also invited my attention to the recent judgment of the Hon'ble Supreme Court in the case of Thyssen Stahlunion Gmbh Vs. Steel Authority of India Ltd, reported in (1999) 9 SCC 334. in para 22 held as under :

Para : 22

For the reasons to follow, we hold :

1. The provisions of the old Act(Arbitration Act, 1940) shall apply in relation to arbitral proceedings which have commenced before the coming into force of the new Act (the Arbitration and Conciliation Act, 1996).

2. The phrase "in relation to arbitral proceedings" cannot be given a narrow meaning to mean only pendency of the arbitration proceedings before the arbitrator. It would cover not only proceedings pending before the arbitrator but would also cover the proceedings before the court and any proceedings which are required to be taken under the old Act for the award becoming a decree under Section 17 thereof and also appeal

arising thereunder.

3. In cases where arbitral proceedings have commenced before the coming into force of the new Act and are pending before the arbitrator, it is open to the parties to agree that the new Act be applicable to such arbitral proceedings and they can so agree even before the coming into force of the New Act.

4. The new Act would be applicable in relation to arbitral proceedings which commenced on or after the new Act comes into force.

5. Once the arbitral proceedings have commenced, it cannot be stated that the right to be governed by the old Act for enforcement of the award was an inchoate right. It was certainly a right accrued. It is not imperative that for right to accrue to have the award enforced under the old Act some legal proceedings for its enforcement must be pending under that Act at the time the new Act came into force.

6. If a narrow meaning of the phrase " in relation to arbitral proceedings" is to be accepted, it is likely to create a great deal of confusion with regard to the matters where award is made under the old Act. Provisions for the conduct of arbitral proceedings are vastly different in both the old and the new Act. Challenge of award can be with reference to the conduct of arbitral proceedings. An interpretation which leads to unjust and inconvenient results cannot be accepted.

7. A foreign award given after the commencement of the ne Act can be enforced only under the new Act. There is no vested right to have the foreign award enforced under the Foreign Awards Act [Foreign Awards (Recognition and Enforcement) Act, 1961].

As per the said decision in para 22 it is held

that the New Act would be applicable in relation to arbitral proceedings which commenced on or after the New Act came into force.

"Section 85(2)(a) - Object and interpretation of Ingredients analyzed

Section 85(2)(a) is the saving clause. It exempts the Old Act from complete obliteration so far as pending arbitration proceedings are concerned. That would include saving of whole of the Old Act up till the time of the enforcement of the award. Thus Section 85(2)(a) prevents the accrued right under the old Act from being affected. Saving provision preserves the existing right accrued under the old Act. Once the arbitral proceedings have commenced, it cannot be stated that the right to be governed by the old Act for enforcement of the award was an inchoate right. It was certainly a right accrued. It is not imperative that for right to accrue to have the award enforced under the old Act some legal proceedings for its enforcement must be pending under that Act at the time the new Act came into force. Section 85(2)(a) of the new Act is in two limbs : (1) provisions of the old Act shall apply in relation to arbitral proceedings which commenced before the new Act came into force unless otherwise agreed by the parties, and (2) the new Act shall apply in relation to arbitral proceedings which commenced on or after the new Act came into force. The first limb can further be bifurcated into two : (a) provisions of the old Act shall apply in relation to arbitral proceedings commenced before the new Act came into force, and (b) the old Act will not apply in such cases where the parties agree that it will not apply in relation to arbitral proceedings which commenced before the new Act came into force."

16. Learned advocate for the defendants has also placed reliance on Section 45 of the New Act which provides power of judicial authority to refer parties to arbitration. This section corresponds section 3 of the Foreign Award Act, 1961 and Section 21 of the Arbitration Act, 1940. The provisions of Section 45 of the New Act which reads as under :

"Sec. 45 Power of judicial authority to refer parties to arbitration :- Notwithstanding

anything contained in Part-I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of on action in a matter in respect of which the parties have made an agreement referred to in Sec. 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

17. The learned counse for the defendants no. 1 and 4 stated that in view of Section 45, the requirement of this Section are as under :

i. There must be an application made in writing.

ii. Such application must be made at any time before judgment of the court is pronounced in the suit.

iii. The application should be made to the court where the suit is pending.

iv. All parties interested in the suit must join in the application.

v. The application must be in respect of the matter in difference in the suit.

17 A. In view of section 45 and in view of the aforesaid submissions, the proceedings of the present suit are required to be stayed as all the conditions precedent stated in section 45 are also satisified in this case as in the present case application has been made by the defendants no. 1 and 4 are made in writing. It was also stated that the application has also been made before the Court where the suit is pending and in that application all are made parties and the application is also in respect of the subject matter of the suit.

17 B. In my view, therefore, the contention raised by defendant nos. 1 and 4 in the present suit are required to be accepted and in view of provisions of Section 3 of the Foreign Awards Act and looking to the facts and circumstances of the case, the conditions laid down therein are accepted. Therefore, the defendant nos. 1 and 4 are entitled to stay of the suit as prayed for by them in the present suit. The party should be relegated

to the commercial arbitration in this behalf.

18. In view of this I finally dispose of the suit with a direction that parties are directed to take appropriate steps for referring the dispute to arbitration in accordance with law.

19. The defendants i.e. defendant nos 1 and 4 as in the suit shall within 6 (six) weeks from today communicated to the plaintiff and the name of the arbitrator appointed by the defendants, if the plaintiff agree with the said request, the arbitrator selected by the parties shall enter upon the reference within two months from today and submit their awards within three months from the date of entering the reference. If there is any difference between the parties, the plaintiff will entitle to appoint the arbitrator within one month from the date of request of the defendants and thereafter, arbitrator appointed by the parties shall enter on the reference within one month from date of the appointment of the arbitration and submit their awards within three months from the date of entering upon the reference.

20. The above directions are required to be given. In view of the fact that the plaintiff's claim is pending since 1975. The suit is accordingly disposed of with no order as to costs.

21. Before I part with the judgment I may state that eminent jurist Shri Nani A. Palkhivala in his book, known as "We, the Nation" on page 209 in an article of International Arbitration V. Litigation in Law Courts, has compared the internationla arbitration with litigation in law courts as under :

> "To sum up, a court of law is a Rolls Royce of 1907 vintage, stately and solemn, while an international commercial arbitration is a 1987 Honda car which will take you to the same destination with far greater speed, higher efficiency and dramatically less fuel consumption."

(K.M.Mehta,J)

(Vipul)